No. 322

IN THE

Supreme Court of the United States

October Term, 1940.

MONTE E. HART, JAMES MONROE SMITH, J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,

vs.

UNITED STATES OF AMERICA.

Notice of Motion for Leave to File Additional and Supplemental Petition of J. Emory Adams, Seymour Weiss and Louis C. LeSage for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1940.

MONTE E. HART, JAMES MONROE SMITH, J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,

vs.

UNITED STATES OF AMERICA.

Notice of Motion.

To the Honorable Francis Biddle, Solicitor General of the United States, for the Respondent:

PLEASE TAKE NOTICE that on the 7th day of October, 1940 at the opening of court on that day a motion for permission to file an additional and supplemental petition for a Writ of Certiorari herein will be submitted for consideration.

Three printed copies of the additional and supplemental petition is served upon you herewith.

It is suggested for the record that since the filing of the original petition and brief the petitioner, MONTE E. HART, has died.

Dated, New York, N. Y., September 26, 1940.

Yours, etc.,

HUGH M. WILKINSON,
DAVID V. CAHILL,
JOHN R. HUNTER,
ROLAND C. KIZER,
Attorneys for Petitioners.

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J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,

Petitioners,

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UNITED STATES OF AMERICA.

Additional and Supplemental Petition of J. Emory Adams, Seymour Weiss and Louis C. LeSage for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit and Argument in Support Thereof.

HUGH M. WILKINSON,
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Supreme Court of the United States

OCTOBER TERM, 1940.

J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE,
Petitioners,

vs.

UNITED STATES OF AMERICA.

Additional and Supplemental Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners respectfully pray that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit entered May 24, 1940 (R., 1785) affirming a judgment of conviction for using the mails in furtherance of a scheme to defraud.

Opinion Below.

There was no opinion in the District Court for the Eastern District of Louisiana in which the case was tried. The opinion of the Circuit Court of Appeals (R., 1779-1785) is reported in 112 F. (2d) 128.

Jurisdiction.

The jurisdiction of this court is invoked under Section 24a of the Judicial Code as amended by the Act of February 13, 1925 (Section 347, Title 28, U. S. C. A.). The judgment of the Circuit Court of Appeals was entered May 24, 1940 (R., Vol. 4, p. 1780).

Within the prescribed time two petitions for writs of certiorari were filed, one on behalf of petitioners, MONTE E. HART, J. EMORY ADAMS, SEYMOUR WEISS and LOUIS C. LESAGE, and the other on behalf of MONTE E. HART alone. It is respectfully suggested for the record that the petitioner, MONTE E. HART, has died since the filing of the petitions. Leave is now being asked on behalf of the remaining petitioners, J. Emory Adams, Seymour Weiss and Louis C. LeSage to file this additional and supplemental petition, presenting in more concise form the reasons for granting the writ and arguments therefor, and additional grounds and arguments not contained in the prior petition. An application is being made simultaneously with the presentation of this petition for its consideration.

Questions Presented.

1. Whether the petitioners caused a check to be placed in the mails for the purpose of executing the scheme charged, where a bank, which had cashed the check for one of the defendants, used the mails for the sole purpose of obtaining payment for itself of the paper which it had purchased.

2. Whether a defendant may cause and be criminally responsible for the act of another where the relationship of principal and agent does not exist.

3. Whether intent to use the mails is an essential element of the crime charged where the indictment al-

leges that the scheme devised "was to be effected by the use and misuse of the post office establishment of the United States" (R. 4-13).

Statute Involved.

The pertinent provisions of the Mail Fraud Statute (Sec. 215, Criminal Code; U. S. C. A. Title 18, Sec. 338) are as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place or cause to be placed, any letter * * * in any * * * authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, * * * or shall knowingly cause to be delivered by mail according to the direction therein, * * * any such letter, * * * shall be fined not more than $1,000, or imprisonment not more than five years or both."

Statement.

The indictment in two counts alleges that the defendants devised a scheme and artifice to defraud Louisiana State University, the State of Louisiana and the tax payers of the State of Louisiana, "which said scheme and artifice to defraud was to be affected by the use and misuse of the post office establishment of the United States" and did use the mails and did cause them to be used in furtherance of said scheme (R., 4-13). The one fraudulent allegation, which apparently constituted the essential element of the scheme, is that petitioners collected $75,000.00 from Louisiana State University on the representation that the University was obtaining certain equipment and furniture as the consideration of that sum, whereas in fact it would not receive that consideration.

The evidence as to the use of the mails is undisputable. The defendant Hart received from Louisiana State University, in payment of the furniture, its check for $75,000.00 drawn on the City National Bank of Baton Rouge and payable to the National Equipment Company, Inc. (R., 459; Ex. G-5, R., 1043). Hart and F. E. Ames, President and Vice-President, respectively, of said company unrestrictedly endorsed the check. Hart then cashed the check at the City Bank Branch of the Whitney National Bank in New Orleans and the sum of $75,000.00 in currency was handed to him by the bank. On the same day, the City Bank Branch sent the check, by messenger, to the main office of the Whitney National Bank. The next day, the Whitney National Bank delivered the check, by messenger, to the Federal Reserve Bank in New Orleans (R., 516, 537-541). The Federal Reserve Bank thereupon forwarded the check and a certain cash letter amounting to $144,004.82 including the $75,000.00 as one of many items by mail to the City National Bank at Baton Rouge (R., 551, 560, 563, Ex. G-64-R., 1341). The act of the Federal Reserve Bank in placing the cash letter and check in the mails is made the basis of the first count of the indictment. The day after the receipt of this check and cash letter, the City National Bank of Baton Rouge mailed a letter to the New Orleans Branch of the Federal Reserve Bank, acknowledging receipt of the cash letter and authorizing the charging of its account with that amount (R., 568-570, Ex. G-65, R., 1352). The delivery of this letter by mail, to the New Orleans Branch of the Federal Reserve Bank is made the basis of the second count of the indictment.

The indictment further alleges that the City Branch of the Whitney Bank and the Whitney Bank, as agents of the defendants, transmitted the check to the Federal Reserve Bank, and that the Federal Reserve Bank, as agent of the Whitney Bank and of the defendants, and "in order to effect payment of said check, forwarded said check"

by mail to the City National Bank of Baton Rouge (R., 4-13).

The Trial Court instructed the jury that the City Bank Branch of the Whitney Bank, by cashing the check "thereby became the owner of said check and consequently said bank could not in the strict legal sense have acted as defendants' agent in the collecting of their own check", and directed the jury to treat as surplusage the charge contained in the indictment "that the New Orleans bank acted as the defendants' agent for the collection of this check" (R., Vol. 2, pp. 1010-1011). The court thereupon instructed the jury that with this question of agency removed from their consideration, they were "still obliged to determine whether or not the use of the mails was caused by the defendants" (R., 1011).

The court had previously instructed the jury upon "causation" as follows:

> "With reference to this question of causation you are instructed that it is not essential to the commission of the offense that the check, letter or writing be deposited in the mail by the defendant himself or by an agent or another acting under his express direction, because he is equally responsible if it be deposited therein as a natural and probable consequence of an act intentionally done by him with knowledge at the time that such will be its natural and probable effect" (R., 1010).

All the defendants were convicted upon both counts of the indictment.

Reasons for Granting Writ.

1. The decision of the Circuit Court of Appeals that the act of the bank in using the mails for the sole purpose of collecting the check after it had acquired title thereto

was in furtherance of the scheme to defraud and caused by the petitioners, is in conflict with applicable decisions of this Court and of other Circuit Courts of Appeals. *Burton* v. *United States,* 196 U. S. 283; *United States* v. *Kenofskey,* 243 U. S. 440; *Demolli* v. *United States,* 144 Fed. 363, 365.

2. The ruling of the Trial Court, affirmed by the Circuit Court of Appeals, that it is not essential to the commission of an offense under the Mail Fraud Statute that the matter mailed be placed in the post office by the defendant himself or by one acting for him is revolutionary in character and makes one responsible for the independent act of another. This ruling is applicable to any criminal or civil proceeding where the responsibility of one for the act of another is involved, and is in conflict with every decision of this Court and of other Circuit Courts of Appeals which have been decided upon the theory that one is not responsible for the act of another where the relationship of principal and agent does not exist.

3. The indictment alleges that the scheme to defraud "was to be effected by the use of the mails." This allegation made intent an essential element of the crime. The Trial Court instructed the jury that the crime was complete if the mails were used as a probable consequence of defendants' act and thereby submitted to the jury an accusation of the scheme essentially different from that described in the indictment. *The indictment was not tried. Defendants were tried on a different accusation framed by the prosecutor and the Court.* Such ruling is in conflict with applicable decisions of this Court and other Circuit Courts of Appeals.

ARGUMENT.

I.

The act of the Whitney Bank in causing the check to be placed in the mails to be sent to the City National Bank of Baton Rouge was the independent act of the bank, not in furtherance of the scheme charged and not caused by the defendants.

When the trial court correctly ruled that the Whitney Bank by cashing the check for Hart thereby became the owner of said check and could not have acted as defendants' agent in the collecting of its own check, the case against the petitioners ended. It is settled law that the matter mailed must have some relation to and be a step in the execution of the scheme charged, *McLendon* v. *United States,* 2 F. (2d) 660; and be mailed with the intent to aid in its execution. *Brewer* v. *United States,* 290 Fed. 807; *Barnes* v. *United States,* 25 F. (2d) 61, 64.

There is no doubt that the legal effect of the bank cashing the check was a change of ownership of the paper, and that the subsequent action of the bank in using the mails to obtain payment for itself of the check which it had purchased "can in no sense be said to be an action of an agent for a principal, but the act of an owner in regard to its own property." *Burton* v. *United States,* 196 U. S. 283, 301.

The check was placed in the mails by the Federal Reserve Bank as the agent of the Whitney Bank and not as the agent of Hart. The check was sent forward to be paid to the Whitney Bank, and the Whitney Bank and not Hart, was its owner when it was sent. The final payment of the check by the City National Bank of Baton Rouge was a payment to the Whitney Bank and not to Hart. *There was no use of the mails by the defendants or for the defendants.* The use of the mails was caused by

the Whitney Bank and was for the sole purpose of collecting for itself as owner the amount of the check it had purchased. *Such use of the mails was the independent act of the Whitney Bank, independent of the defendants and independent of the scheme charged to have been devised by the defendants.*

From the time Hart sold the check to the Whitney Bank he had no further interest in or control over said check, and no right to issue instructions to the Bank to use or not to use the mails in the collecting of the check. At the time the mails were used Hart had already received $75,000 for the check and had no interest in and was to receive no part of the $75,000 to be paid on the check to the Whitney Bank. *The check's connection with the defendants and with the scheme charged ended when Hart sold the check to the Whitney Bank and received $75,000 in currency.* As stated by this Court in *Burton* v. *United States* (*supra*) 297: "From the time of the delivery of the check by the defendant to the bank, it became the owner of the check; it could have torn it up or thrown it into the fire or made any other use or disposition of it which it chose, and no right of the defendant would have been infringed."

Had Hart presented the check to the Whitney Bank for collection instead of cashing it, the bank would have become Hart's agent and the defendants would have been responsible for any use of the mail made by the bank in collecting the check, though the bank was an entirely innocent agent. As collection of the check in that case would have been a necessary part of the working out of the scheme, the defendants would have caused the use of the mails in furtherance of the scheme charged. *Spear* v. *United States,* 246 Fed. 250; *Tincher* v. *United States,* 11 F. (2d) 1821; *Mackett* v. *United States,* 90 F. (2d) 462, 464.

However, title to the check passed to the bank when the bank paid Hart $75,000 for the check. Collection of the

check was no longer any part of the working out of the scheme. Collection of the check by the Whitney Bank was apart from and independent of the scheme and not a step in its execution. The use of the mails by the Whitney Bank could have no effect, direct or indirect in the furthering of the scheme. There was no use of the mails for the purpose of executing the scheme and therefore no violation of the Mail Fraud Statute.

The court's submission of the cause without any basis in fact and upon an untenable theory of "causation," that is, "causation" without "agency" was a revolutionary rewriting of the general principles of responsibility of one for the acts of another. This ruling permitted the jury to determine whether the defendants caused and were responsible for the independent use of the mails by the Whitney Bank, although both the instructions of the Court and the record on its face eliminated that question and made its consideration logically impossible.

It is elementary that one cannot cause or be responsible for the act of another where the relationship of principal and agent does not exist. *Mosby* v. *Kimball,* 345 Ill. 420; *National Bank of Spokane* v. *Bank of Little Rock,* 58 Fed. 140. It is solely through the operation of the principle of agency that the act or declaration of one, associated with others in the prosecution of a common plan or enterprise, lawful or unlawful, is admissible against and binding upon all, *Hitchman Coal and Coke Co.* v. *Mitchell,* 245 U. S. 229, 249; *Kassin* v. *United States,* 87 F. (2d) 183. One cannot cause or be responsible for the independent act of another. The very words imply a contradiction in terms. Agency is essential to establish causation. Absent agency, absent causation.

This principle is as applicable to offenses under the Mail Fraud Statute as to any other type of criminal case. One is responsible for the act of another in placing a letter in the mails in execution of a scheme to defraud, only where the relationship of principal and agent exists. This

does not mean that it is essential to the commission of the offense that the letter be placed in the mails by the defendant himself or by another acting under his express direction. Responsibility follows whether an agent, express or implied, innocent or otherwise is intentionally employed to reach and use the mails in affecting a scheme to defraud. *Spear* v. *United States,* 228 Fed. 485, 488. The purpose of the Statute is to prohibit the use of the mails in furtherance of a scheme to defraud, and to punish one who procures such use, whether he acts through innocent agents or otherwise. *United States* v. *Guest,* 74 F. (2d) 730.

Cause is used in the Mail Fraud Statute "in its well known sense of bringing about." *United States* v. *Kenofskey,* 243 U. S. 440, 443. For one to "bring about" the use of the mails it is clear that he must do some act to effect that result. It must be evident that one cannot cause or "bring about" the use of the mails where the letter is placed therein by one "in no sense" his agent, that is, by one "in no sense" acting for him. The necessity for the existence of the relationship of principal and agent to establish responsibility for the act of another applies with the same force to the act of placing a letter in the mails in the execution of a scheme to defraud, as to any other act.

True, it has long been settled that a defendant may cause a letter to be sent or delivered by mail in execution of a scheme, though such a mode of transmission was neither known nor intended, *provided use of the mails as a step in the execution of the scheme* was the natural and probable consequence of an act intentionally done by the defendant in executing the scheme or might reasonably have been foreseen by the defendant at the time such act was committed. The aforesaid rule is due to the fact that intent to use the mails is not an essential element of the offense, and not to any modification of the rule requiring the existence of the relationship of principal and agent to

establish one's liability for the use of the mails by another. Where a letter is placed in the post-office by a person other than the accused, the rule of probable consequence has no relevancy to the question whether such person was acting for the accused or for himself. It is only after it has been determined that the person placing the letter in the mail is the agent of the accused, that the question arises whether the placing of the letter therein *as a step in the execution of the scheme* was the natural and probable consequence of an act intentionally done by the accused in executing the scheme or might reasonably have been foreseen by him at the time the act was committed.

Moreover, not every incidental use of the mails that occurs as a result of the scheme would constitute a violation of the law. The letter must be mailed or caused to be mailed in furtherance of the scheme by the defendant. *Spillers* v. *United States,* 47 F. (2d) 893. The general rule may be deduced from the reported cases, that whenever a person sets in operation and makes use of an agent or agency which as he knew at the time would according to its established and regular course place a letter in the mail as a step in the execution of the scheme, he is guilty of causing the mails to be used in furtherance of such scheme. Such a rule would require, where the letter is placed in the mails by another, that such person act for the accused, that is, as his agent.

The trial court's submission of the cause to the jury, affirmed by the Circuit Court of Appeals, upon the theory that it was not essential to the commission of the offense that the check be placed in the mails in furtherance of the scheme to defraud, by the defendant or by one acting for the defendant does violence to the fundamental principles of all criminal, civil and moral law, and is clearly in conflict with the decision of this Court in *United States* v. *Kenofskey, supra,* and the decision of the Circuit Court

of Appeals, Eighth Circuit in *Demolli* v. *United States,* 144 Fed. 363, 365.

The Circuit Court of Appeals in affirming the judgment of conviction utterly failed to pass upon the correctness of the Trial Court's ruling upon causation, but adopted a different theory in its attempt to avoid the logical consequence of the bank's ownership of the check at the time the mails were used. The Circuit Court of Appeals affirmed the conviction of the defendants on the assumption that the alleged scheme to defraud was not at an end when Hart endorsed and presented the check to the Whitney Bank, but continued until the L. S. U. account at the City National Bank of Baton Rouge was charged with the check. The sole basis for this conclusion, as stated in the opinion of the court, is that the University sustained no actual loss until the check had been finally paid and up to that time the University might have intervened to stop payment and the fraudulent scheme would have been frustrated.

The Circuit Court of Appeals in reaching its conclusion completely overlooked the legal effect of the bank's cashing of the check for Hart. The Whitney Bank by cashing the check and paying Hart $75,000 in currency, the face amount of the check, became a holder in due course of said check. This fact cannot be disputed. It is elementary that the drawer of the check has no legal right to revoke his check, that is, stop payment after the instrument has passed into the hands of a *bona-fide* holder for value. *Universal Supply Co.* v. *Hildreth,* 287 Mass. 538; *Carhort* v. *Second National Bank,* 98 N. J. L. 373; *Gage Hotel Co.* v. *Union National Bank,* 171 Ill. 551. Fraud relating to the consideration for which a check is given is never a defense in an action thereon by a *bona-fide* holder for value in due course. *Bridgeport Nat. Bank* v. *Blackman,* 249 N. Y. 322.

The University's liability on the check was established and fixed the moment the check was purchased by the

Whitney Bank. It is true that the University might have ordered the bank not to pay the check and, as between the University and the Bank, the Bank in such case would pay at its peril, but such an order could not or would not discharge the liability of the University to the Whitney Bank. Such order would not have frustrated the scheme to defraud, if it were one, for the defendants had already collected the $75,000, the object of the fraud, and the University was liable to the Whitney Bank for the $75,000 which had been paid to Hart in good faith and without notice of the alleged fraud.

It may be well to call the Court's attention to the fact that counsel in this Petition do not contend that the scheme was at an end when the Bank cashed the check for Hart, but do contend that the check's connection with the scheme was at an end, and that the use of the mails by the Whitney Bank to collect for itself as owner the amount of this check, could not have been for the purpose of executing the scheme charged or in furtherance thereof.

The Circuit Court of Appeals further held that Hart clearly caused the mails to be used in furtherance of the scheme to defraud. The sole basis of this conclusion, as stated in its opinion, is that "when Monte Hart presented the check to City Bank Branch it could be reasonably foreseen that in the usual course of events the check would pass through the United States Mail to Baton Rouge to be paid."

Conceding this fact, such knowledge would not make Hart guilty of the offense charged unless the Federal Reserve Bank in placing the check in the mails to be sent to the Bank at Baton Rouge acted for Hart and the check was placed therein for the purpose of executing the scheme charged. Section 215 of the Criminal Code does not prohibit the general use of the mails to the deviser of a scheme to defraud or make the placing of the check in the mails *per se* a violation of the statute. The

statute prohibits the use of the mails to a deviser of a scheme to defraud only when such use is for the purpose of executing such scheme or attempting so to do, and makes the placing of a check in the mails an offense only when the check is placed therein or caused to be placed therein by the defendant for the purpose of executing such scheme.

In the instant case the use of the mails was caused by the Whitney Bank for the sole purpose of collecting for itself as owner the amount of the check from the bank upon which it was drawn. The use of the mails was therefore the independent act of the Whitney Bank, not in furtherance of the scheme charged and not caused by the defendants.

II.

The indictment alleges that the scheme alleged was to be effected by the use of the mails and the court below erred in submitting the case to the jury on the theory that the defendants might be held responsible for the use of the mails not intended by defendants as a part of the scheme.

As the indictment stands it alleges an agreement or conspiracy on the part of the defendants to use the mails in order to carry out their scheme (R., 4-13). It is true that a crime might have been alleged in different form, as is commonly done, and the element of intent to use the mails would then have been eliminated, but that is not the situation in this case.

The court below erred in ignoring this fundamental element of the case and proceeded to submit the case to the jury on the theory that there need be no intent to use

the mails on the part of the defendants, but that they would be responsible for any use of the mails, which was the natural and probable consequence of their acts. The court in its instructions told the jury that it was not necessary that the defendants should directly use the mails or use the mails through an agent or that they should intend to use the mails, but that under the theory of causation, the defendants could be guilty of using the mails even if the person actually using them was not their agent.

These instructions were wholly inapplicable to this type of indictment. An exception to the charge on the subject of causation was duly taken (R., 1019). Error was also assigned on this ground (R., 1671).

The case tried clearly was not the case alleged, and defendants were convicted of using the mails without intent to use them, although the indictment alleges that their plan was to use the mails for the purpose of effecting the scheme. The case as alleged in the indictment, is essentially the same as a charge of conspiracy to cause the use of the mails in furtherance of a scheme to defraud. In such case the intent to use the mails must be proved and appropriate instructions must be given on the subject.

It is respectfully urged that this point is fundamental to the very basis of the Government's case and that a disposition of the case which ignores the point amounts to fundamental error. It involves also a conflict with numerous decisions on the subject of intent to use the mails, where that intent is alleged as an element of the crime. *Mazurasky* v. *United States,* 100 F. 958, 962; *Farmer* v. *United States,* 223 F. (2d) 903, 907.

Conclusion.

It is urged that the petition presents an important question of Federal law of wide application and public interest and a serious conflict between the decisions of the

Courts below and applicable decisions of this Court and various Circuit Courts of Appeals which requires the exercise of this Court's supervisory jurisdiction.

Respectfully submitted,

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